

FCC MAIL SECTION

HEARING DESIGNATION ORDER

Before the
Federal Communications Commission
Washington, D.C. 20554

Adopted: April 7, 1993;

Released: April 15, 1993

By the Chief, Audio Services Division:

DISPATCHED BY
MM Docket No. 93-107

In re Applications of:

DAVID A. RINGER File No. BPH-911230MA
(hereafter "Ringer")

ASF BROADCASTING File No. BPH-911230MB
CORPORATION
(hereafter "ASF")

WILBURN INDUSTRIES, File No. BPH-911230MC
INC.
(hereafter "Wilburn")

KYONG JA MATCHAK File No. BPH-911230MF
(hereafter "Matchak")

SHELLEE F. DAVIS File No. BPH-911231MA
(hereafter "Davis")

WESTERVILLE File No. BPH-911231MB
BROADCASTING COMPANY
LIMITED PARTNERSHIP
(hereafter "WBC")

OHIO RADIO File No. BPH-911231MC
ASSOCIATES, INC.
(hereafter "ORA")

For Construction Permit for
an FM Station on Channel 280A
in Westerville, Ohio

1. The Commission has before it the above-captioned mutually exclusive applications for an FM station. These applicants have filed for a channel allotment that became vacant as a result of denial of a renewal application for WBBY-FM, Westerville, Ohio. *Mid-Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986), *review denied*, 5 FCC Rcd 940 (1990), *reconsideration denied in part and dismissed in part*, 5 FCC Rcd 4596 (1990).

2. *Preliminary Matter.* On March 26, 1992, ORA filed petitions to deny the applications of Ringer, ASF, Wilburn, Matchak, and Davis.² These applicants have proposed to use former station WBBY-FM's existing transmitter site which is short-spaced, pursuant to 47 C.F.R. § 73.207,³ to WTTF-FM, Tiffin, Ohio. ORA contends that the above-mentioned applications must be dismissed, as two of the remaining applicants in the proceeding, ORA and WBC, propose sites that are fully-spaced.⁴ ORA contends that in comparative hearings, when an applicant is short-spaced and at least one other applicant in the proceeding proposes a fully-spaced and technically suitable site, it is Commission policy to deny the short-spaced applicant. ORA further claims that these applicants are proposing to use WBBY-FM's existing short-spaced site for private economic reasons and granting them would not be in the public interest when two other applicants in the proceeding are proposing fully-spaced sites.

3. ORA, in its petitions, further objects to the applications of Ringer, ASF and Matchak because each filed their respective applications using the provisions of 47 C.F.R. § 73.215.⁵ ORA claims that pursuant to the *Report and Order* in MM Docket No. 87-121, 4 FCC Rcd 1681 (1988), an applicant can only request processing under 47 C.F.R. § 73.215 when no other fully-spaced sites are available and therefore, these applications should be dismissed.

4. Ringer, ASF and Matchak, in their respective oppositions and related filings, argue that 47 C.F.R. § 73.207 permits them to request processing under 47 C.F.R. § 73.215. Ringer and ASF further contend that ORA has misinterpreted the *Report and Order, supra*, and that, there-

¹ Mutually exclusive applicants Juanita M. and James L. Dean (BPH-911230MD) and John L. Landy (BPH-911230ME) were dismissed on July 14, 1992, for failure to pay a hearing fee.

² On April 7, 1992, ASF filed an opposition to ORA's petition to deny. On April 8, 1992, Ringer, Matchak and Davis filed their oppositions. On April 10, 1992, Davis filed a supplement to her opposition. On April 9, and April 14, 1992, Wilburn filed an opposition and supplement to its opposition. On April 20, 1992, ORA filed a reply to each of the oppositions. On April 27, 1992, Davis filed a motion to strike part of ORA's reply and on May 6, 1992, ORA filed an opposition to Davis' motion. On May 1, 1992, Matchak filed a response to ORA's reply and on May 6, 1992, ORA filed a motion to strike that response. On July 29, 1992, ORA filed supplements to the petitions to deny. On August 6, August 10, August 11, August 12, and August 31, 1992, Wilburn, ASF, Davis, Ringer, and Matchak, respectively, filed oppositions to ORA's supplements. On August 19, 1992, ORA filed a reply to Davis' opposition. On January 25, 1993, ORA filed additional supplements to the petitions to deny the applications of Ringer, ASF, Wilburn, Matchak, and Davis. On

January 28, February 1, February 4, and February 16, 1993, ASF, Wilburn, Ringer, and Davis, respectively, filed oppositions to ORA's supplements to the petitions to deny. Finally, on February 19, 1993, ORA filed a consolidated reply to the oppositions.

³ Section 73.207 lists the minimum distance separation requirements between FM broadcast stations.

⁴ The same contention is made by WTTF, Inc., licensee of Station WTTF-FM, Tiffin, Ohio, in informal objections filed September 11, 1992, against Ringer, ASF, Wilburn, Matchak and Davis. In light of the action taken herein, the informal objections are denied.

⁵ Section 73.215 states in part that "[t]he Commission will accept applications that specify short-spaced antenna locations (locations that do not meet the domestic co-channel and adjacent channel minimum distance separation requirements of § 73.207); Provided That, such applications propose contour protection . . . with all short-spaced assignments, applications and allotments, and meet the other applicable requirements of this section. . . ."

in, the Commission intended to afford applicants increased flexibility in selecting their sites, not to restrict them only to fully-spaced sites.

5. Wilburn and Davis have each requested processing under 47 C.F.R. § 73.213(c)(1).⁶ ORA contends that 47 C.F.R. § 73.213 applies only to existing stations, not vacant allotments. ORA further claims that while WBBY-FM was "grandfathered" under 47 C.F.R. § 73.213, this "grandfathering" does not extend to a new applicant for the same allotment. Additionally, ORA argues that Davis' application should be dismissed because Davis intends to increase its effective radiated power (ERP) from 3 kilowatts to 6 kilowatts ERP and has failed to obtain the consent of WTTF-FM for the increase in interference.

6. Wilburn and Davis, in their respective oppositions and related filings, argue that WBBY-FM became short-spaced when the spacing rules changed in 1989, and was "grandfathered" pursuant to 47 C.F.R. § 73.213. Wilburn and Davis further state that they are merely applying to use the facilities as licensed to WBBY-FM. Wilburn argues that "where the reference point of an allotment was fully-spaced when the allotment was made and the station was constructed and became short-spaced only by virtue of the new spacing rules, an applicant which proposes to replace a pre-existing facility on that channel may still apply for a station to operate at such reference point." Wilburn Opposition, at 5. Wilburn and Davis also contend that 47 C.F.R. § 73.207 specifically acknowledges the "grandfathering" provisions of 47 C.F.R. § 73.213.

7. Regarding Davis' increase in power, Davis contends that, while it is proposing to increase its power from 3 kilowatts ERP to 6 kilowatts ERP, it will limit its radiation toward WTTF-FM to 3 kilowatts ERP/100 meters antenna height above average terrain (HAAT) as allowed by 47 C.F.R. § 73.213(c)(1) and WTTF-FM's consent to this change is not necessary.

8. Ringer, ASF, Wilburn, Matchak, and Davis have each requested processing under either 47 C.F.R. § 73.215 or § 73.213 and, pursuant to 47 C.F.R. § 73.207(a), are exempt from processing under the Commission's general minimum spacing requirements. OAR's contention that the above-mentioned applications should be dismissed because there are applicants in the proceeding proposing fully-spaced sites is without merit. These applicants are permitted to assume the short-spacing of WBBY-FM, the previous licensee. See *EZ Communications, Inc.*, FCC Rcd _____, DA 93-361, adopted March 26, 1993 (M.M. Bur.). The Commission will not give preferential treatment to applicants requesting processing under 47 C.F.R. § 73.207 over applicants requesting processing under 47 C.F.R. §

73.215 or § 73.213. Further, the applicant's reasons for proposing the use of former station WBBY-FM's transmitter site are immaterial. Each applicant must meet the technical requirements of the specific rules under which they request processing.⁷

9. Section 73.215(e) requires that a spacing of 96 kilometers be maintained between the site proposed by Ringer, ASF and Matchak (former station WBBY-FM's existing transmitter site) and WTTF-FM. The site proposed by Ringer, ASF and Matchak is 106.2 kilometers from WTTF-FM's transmitter site. Therefore, Ringer, ASF and Matchak's applications are eligible for processing under 47 C.F.R. § 73.215.

10. Prior to 1989, the Westerville, Ohio allotment was fully-spaced to WTTF-FM. However, in 1989, when the Commission revised the minimum spacing requirements, the Westerville allotment became short-spaced to WTTF-FM. Section 73.213(c)(1) requires that a spacing of 105 kilometers be maintained between the site proposed by Wilburn and Davis (former station WBBY-FM's existing transmitter site) and WTTF-FM. The site proposed by Wilburn and Davis is 106.2 kilometers from WTTF-FM's transmitter site. Accordingly, their applications are eligible for processing under 47 C.F.R. § 73.213(c)(1).

11. As to ORA's contention that Davis must have WTTF-FM's consent to increase its power from 3 kilowatts ERP to 6 kilowatts ERP, Davis proposes to limit its radiation toward WTTF-FM to 3 kilowatts ERP/100 meters antenna HAAT. The Commission has held that it will "permit facility enhancements sought pursuant to § 73.213 that retain current coverage in directions where overlap exists..." *Memorandum Opinion and Order* in MM Docket No. 88-375, 6 FCC Rcd 3417, 3423 (1991). Since Davis proposes to maintain the 3 kilowatt ERP/100 meters antenna HAAT toward WTTF-FM, the consent of WTTF-FM is not required.

12. Additionally, ORA, in its petitions, alleges that Matchak and Davis filed amendments to correct deficiencies after the amendment-as-of-right date and that these late-filed amendments cannot be accepted for comparative purposes or to correct acceptability defects. In opposition, both Matchak and Davis submitted date-stamped copies of their amendments which reflected that the amendments were filed on March 9, 1992, and that the dates of the

⁶ Section 73.213(c) applies to stations that were fully-spaced pursuant to 47 C.F.R. § 73.207 prior to October 1, 1989, and which became short-spaced when 47 C.F.R. § 73.207 was revised. *Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989). Section 73.213(c) of the Commission rules states in part that "[i]f the reference coordinates of an allotment are short-spaced [under § 73.207] to an authorized facility or another allotment (as a result of the revision of § 73.207 in the *Second Report and Order* in MM Docket No. 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this section only with respect to such short-spacing." Section 73.213(c)(1) states that "[e]ach application for authority to operate a Class A station with no more than 3000 watts ERP and 100 meters antenna HAAT . . . must specify a transmitter

site that meets the minimum distance separation requirements in this paragraph."

⁷ ORA's supplements filed January 25, 1993, allege that in *John M. Salov*, 8 FCC Rcd 172 (1993), the Commission held that 47 C.F.R. § 73.213 applied only to existing short-spaced "stations" and that when allotments became vacant, 47 C.F.R. § 73.213 is no longer applicable. ORA further contends that the Commission stated that 47 C.F.R. § 73.215 could not be used to perpetuate "grandfathering" caused by a deleted station. The case cited by ORA is inapposite because, therein the Commission rescinded a short-spaced allotment that was no longer in compliance with the Commission's allotment policies. *John M. Salov*, 8 FCC Rcd at 174. In the case at hand, the Westerville allotment, which became short-spaced to WTTF-FM in 1989, continues to satisfy the Commission's allotment requirements

amendments were corrected to reflect that they were both filed on March 9, 1992, within the amendment-as-of-right period.⁸

13. *WBC*. Our Antenna Survey Branch has informed us that the Federal Aviation Administration (FAA) has determined that WBC's proposed tower structure is a hazard to air navigation due to potential electromagnetic interference (EMI). Accordingly, an air hazard issue will be specified.

14. *EEO*. The Commission requires that if there will be five or more full-time station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Ringer, ASF and Davis have filed such statements, they are deficient. Both Ringer and ASF have not supplied the name or title of the official who will be responsible for implementing the station's EEO program in response to Section II. Davis has failed to list a women's recruitment organization. Accordingly, Ringer, ASF and Davis will be required to file an amended EEO program with the presiding Administrative Law Judge or an appropriate issue will be specified by the Judge.

15. *Financial*. Section III, Item 3 of FCC Form 301 (June 1989) requires that an applicant specify each source of funds, including the name, address, telephone number, contact person if the source is an entity, any relationship of the source to the applicant, and the amount of funds to be supplied by each source. Although Davis has provided the name of the entity providing her funds, she has not provided the name of a contact person as requested in Item 3. Additionally, WBC has provided the name of the source of its funds but has not provided the address and telephone number of that source. Accordingly, Davis and WBC must each file an amendment which gives all the information required by Section III, Item 3 with the presiding Administrative Law Judge after this Order is released.

16. *Other matters*. The applicants below amended their applications on the dates shown. All of the amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.⁹

APPLICANTS

Ringer
ASF
Davis

AMENDMENTS FILED

April 29, 1992
March 24, 1992
May 4, 1992

17. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by WBC would constitute a hazard to air navigation.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That the petitions to deny filed by ORA and the informal objections filed by WUTF, Inc. ARE HEREBY DENIED.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

22. IT IS FURTHER ORDERED, That in accordance with paragraph 14 hereinabove, Ringer, ASF and Davis shall file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 15 hereinabove, Davis and WBC shall both submit an amendment which contains the information required by Section III, Item 3 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That the late amendments filed by Ringer, ASF, and Davis ARE ACCEPTED to the extent indicated.

⁸ pursuant to 47 C.F.R. § 73.213(c).

⁹ ORA also contends that Davis engaged in *ex parte* communications with the Commission's staff regarding this matter. However, we have determined that the communications by Davis and Matchak were not *ex parte* violations. Rather, they were status inquiries regarding the amendments, which had been erroneously date-stamped by the staff. Similarly, ORA contends that Davis' conversations with the Commission's staff, which occurred prior to December 27, 1991 (the date of Davis' engineering exhibit which references the conversations with the

staff), regarding the filing of her application were *ex parte* communications. We have determined that these communications were not *ex parte* violations because they were made prior to the filing of an application by any of the applicants in this proceeding. See *Report and Order* in MM Docket No. 86-225, 2 FCC Rcd 3011, 3023 (1987).

⁹ On April 16, 1992, Davis filed an opposition to ASF's amendment alleging that it should only be accepted for 47 C.F.R. § 1.65 purposes and that it should not alter ASF's comparative qualifications.

25. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

26. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

27. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau